

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:RFPH:ATL:POSTF-138917-02
CLRountree

date: August 16, 2002

to: Appeals Officer Barbara L. Farrell
Appeals LBSP Area 2, Atlanta, Georgia

from: Associate Area Counsel
(Retailers, Food and Pharmaceuticals and Healthcare)

subject: [REDACTED] Inc. and Subsidiaries

E.I.N.: [REDACTED]
Forms 1120 for Taxable Years Ended December 31, [REDACTED]
and December 31, [REDACTED]
Chapter 11
Case No. [REDACTED]
(U.S.B.C. D. Delaware)

This memorandum modifies and corrects our advice set forth in our memorandum dated July 24, 2002 as to when the Internal Revenue Service (Service) may assess the income tax deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] reflected in the Form 870-AD executed by [REDACTED] Inc. and Subsidiaries [REDACTED] and the Appeals Office by [REDACTED].

Based on the following discussion, we have concluded that all restrictions on the Service's authority to assess the agreed deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] expired by [REDACTED]. In addition, [REDACTED]'s Chapter 11 discharge does not prohibit assessments of the agreed deficiencies. With respect to the portion attributable of the deficiencies to the net operating loss (NOL) carrybacks from the year ended December 31, [REDACTED], the period for assessment will not expire before [REDACTED]. With respect to the portion of the deficiency for the taxable year ended December 31, [REDACTED] attributable to the NOL carryback from the year ended [REDACTED], the period for assessment will not expire before [REDACTED].

Therefore, we recommend that the Service assess the income tax deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] as soon as possible.

Issues

1. When may the Service assess the income tax deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] set forth in the Form 870-AD executed by for [REDACTED] and the Appeals Office.

2. If the statutory limitation periods for assessment of the agreed deficiencies in income tax remain have not expired, whether the Chapter 11 discharge granted to [REDACTED] prohibits the Service from assessing the deficiencies.

Facts

On [REDACTED], [REDACTED] filed a Chapter 11 petition with the United States Bankruptcy Court for the District of Delaware (Bankruptcy Court).

On [REDACTED], the Service timely issued a notice of deficiency asserting the following income tax (Form 1120) deficiencies against [REDACTED]:

<u>Year</u>	<u>Deficiency</u>
[REDACTED]	\$ [REDACTED]
Total	\$ [REDACTED]

On [REDACTED], the Service filed a timely proof of claim with the Bankruptcy Court that included the above income tax deficiencies plus prepetition deficiency interest. These liabilities relate to the proposed recoupment of refunds related to disallowance of tentative carrybacks of NOLs from subsequent taxable years.

The due date of [REDACTED]'s Form 1120 for the taxable year ended December 31, [REDACTED] was [REDACTED]. The proposed deficiency for the taxable year ended December 31, [REDACTED] is attributable to the disallowed portion of a NOL carryback from the taxable year ended December 31, [REDACTED]. Because [REDACTED] filed its Form 1120 for the taxable year ended December 31, [REDACTED] on [REDACTED] the applicable three-year limitation period for assessment of any deficiency related to the NOL

carryback from the taxable year ended December 31, [REDACTED] to the taxable year ended December 31, [REDACTED] under I.R.C. §6501(a) would not expire before [REDACTED]. See I.R.C. §6501(h), §6501(k), and §7503.

The due date of [REDACTED]'s Form 1120 for the taxable year ended December 31, [REDACTED] was [REDACTED]. The proposed deficiency for the taxable year ended December 31, [REDACTED] is attributable to the disallowed portions of NOL carrybacks from the taxable years ended December 31, [REDACTED] and [REDACTED]. As discussed in the previous paragraph, the applicable three-year limitation period for assessment of any deficiency related to the NOL carryback from [REDACTED] to [REDACTED] would not expire before [REDACTED]. See I.R.C. §6501(h), §6501(k), and §7503. Because [REDACTED] filed its Form 1120 for the year ended [REDACTED] on [REDACTED], the applicable three-year limitation period for assessment of any deficiency related to the NOL carryback from the taxable year ended [REDACTED] to the taxable year ended December 31, [REDACTED] under I.R.C. §6501(a) would not expire before [REDACTED]. See I.R.C. §6501(h) and §6501(k).

Consequently, when the Service issued the notice of deficiency on [REDACTED], the number of days remaining on the limitation periods attributable to the disallowed portion of the NOL carrybacks from the year ended December 31, [REDACTED] to the years ended December 31, [REDACTED] and December 31, [REDACTED] was [REDACTED]. The number of days remaining on the limitation period attributable to the disallowed portion of the NOL carryback from the year ended [REDACTED] to the year ended December 31, [REDACTED] was [REDACTED].

By [REDACTED], [REDACTED] and the Service executed a Consent to Extend the Time to Assess Tax (Form 872) for the year ended [REDACTED] until [REDACTED] under I.R.C. §6501(c)(4). Under the terms of such Form 872, the issuance of the SND to [REDACTED] for the year ended [REDACTED] before [REDACTED] would further extend the time for assessment "by the number of days the assessment was previously prohibited, plus 60 days." The Service has not issued a notice of deficiency for the taxable year ended [REDACTED].

Consequently, the express terms of the Form 872 for the year ended [REDACTED] extended the number of days remaining on the limitation period for assessment related to that year and the year related to any NOL carryback (December 31, [REDACTED])

by [REDACTED] days (from [REDACTED] until [REDACTED]).

By order dated [REDACTED], the Bankruptcy Court authorized [REDACTED] to execute a proposed Form 870-AD agreeing to assessment of the following income tax deficiencies:

<u>Year</u>	<u>Deficiency</u>
[REDACTED]	\$ [REDACTED]
[REDACTED]	[REDACTED]
Total	\$ [REDACTED]

The proposed Form 870-AD conditioned the effectiveness of [REDACTED]'s agreement to assessment on the following:

[REDACTED]

On [REDACTED], [REDACTED] s duly authorized vice president, executed the Form 870-AD. In executing the Form 870-AD on [REDACTED]'s behalf, [REDACTED] agreed to waive the restrictions on assessment of the deficiencies under I.R.C. §6213(a) and consented to assessment and collection of the above agreed deficiencies and interest as provided by law.

On [REDACTED], [REDACTED] Appeals Team Manager, executed the Form 870-AD on behalf of the Service.

On [REDACTED], the Bankruptcy Court entered an order confirming [REDACTED]'s Chapter 11 plan.

█'s confirmed Chapter 11 plan provides that allowed
prepetition priority tax claims will be paid as follows:

█

See Section █ on page █ of the confirmed plan.

The plan defines an allowed priority tax claim as meeting
four conditions:

█

█

█

█

See Section █ on pages █, █
and █ of confirmed plan.

We do not know how █ described its Form 1120
liabilities in its schedules.

The Service's Bankruptcy Unit plans to amend the
Service's proof of claim to reflect the agreed deficiencies
set forth in the Form 870-AD for █ and █. As of the
date of this memorandum, we are not aware of any objections to

the Service's claim for these liabilities or agreement to extend the claims objection deadline. Although [REDACTED] has not asserted that the Service's claim should be reduced by amounts under I.R.C. §502(d), the Service's transcripts of account reflect possible overpayment credits that could allow such a reduction.

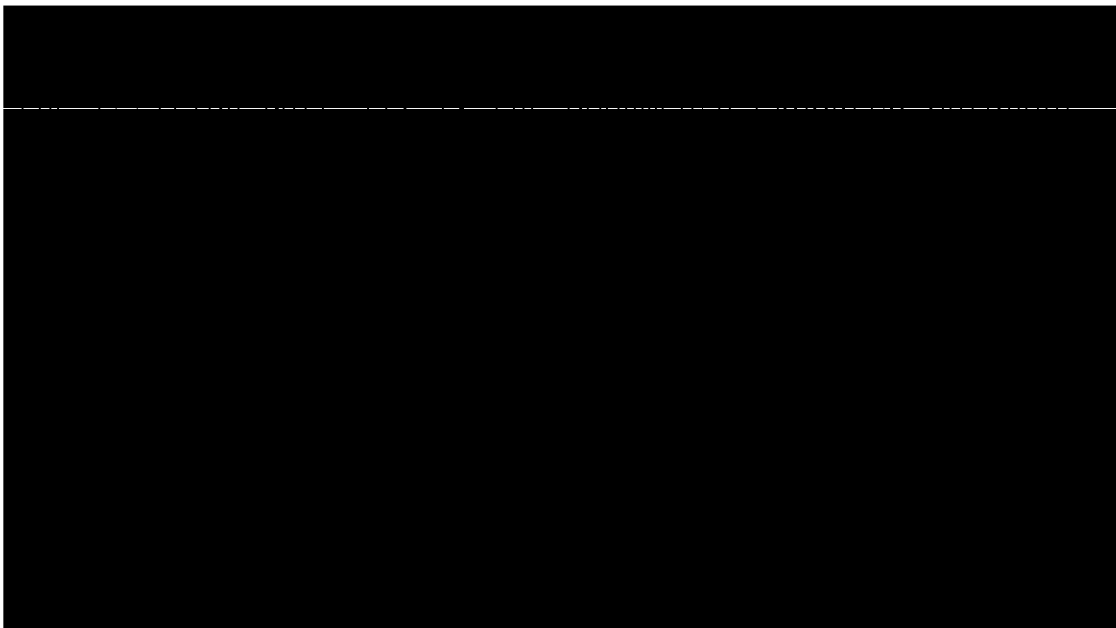
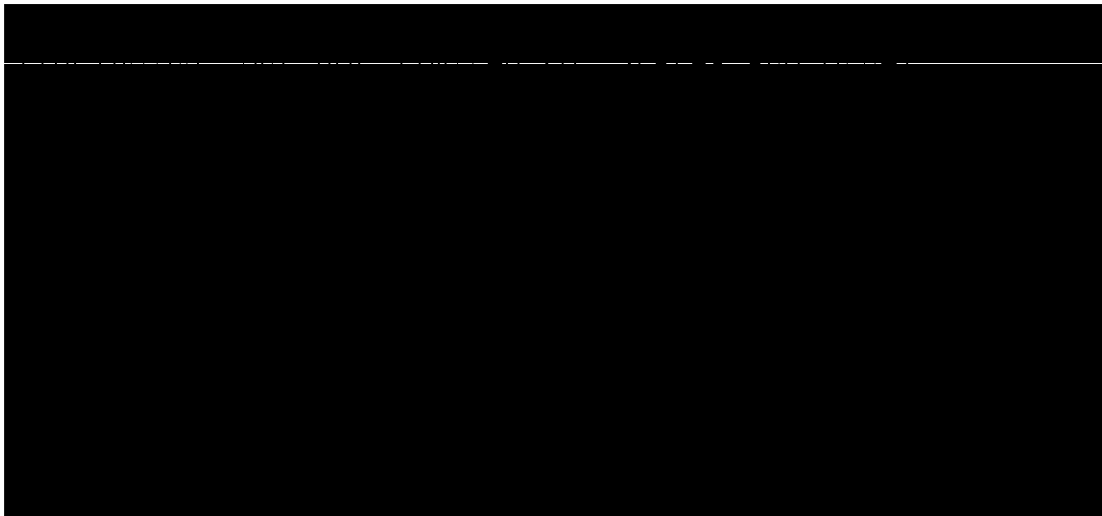
Because the Service's original claim was filed on [REDACTED] and the plan's effective date was [REDACTED], the 180-day period for [REDACTED] to object to the Service's claim will be [REDACTED]. However, because that period ends on a weekend and [REDACTED] is a federal holiday, the expiration of the claims objection period will be [REDACTED]. See Section [REDACTED] on page [REDACTED] of the confirmed plan.

The confirmation order specifically finds that the plan satisfies the requirements of 11 U.S.C. §1129(a)(9) for priority tax claims. See page [REDACTED] of the confirmation order.

We are not aware of any agreement that provides for payment of prepetition priority tax claims in any manner than as provided for in the confirmed Chapter 11 plan.

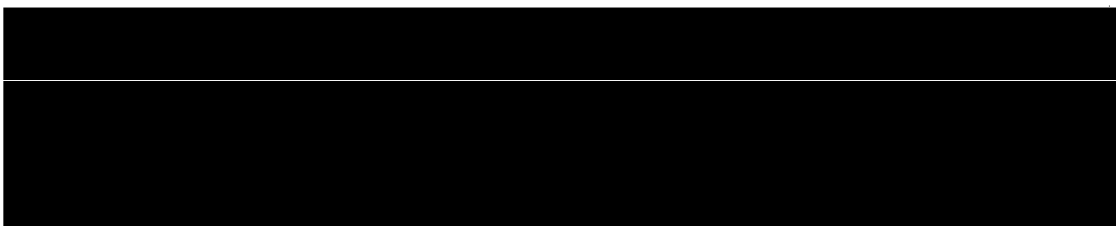
[REDACTED]'s confirmed Chapter 11 plan provides [REDACTED] with the following discharge on the plan's effective date:

[REDACTED]



See Section [REDACTED] on pages [REDACTED] of plan.

The confirmation order reiterates the discharge granted to [REDACTED] in Section [REDACTED] of the Plan. See paragraphs [REDACTED] and [REDACTED] on pages [REDACTED] of the confirmation order. In addition, this order conditioned [REDACTED]'s discharge as follows:



[REDACTED]
[REDACTED]

See paragraph [REDACTED] on page [REDACTED] of the confirmation order.

The effective date of [REDACTED]'s Chapter 11 plan was [REDACTED]. See Section [REDACTED] of [REDACTED]'s Chapter 11 plan; Notice of Effective Date of [REDACTED]'s Chapter 11 plan entered [REDACTED].

Before issuance of the confirmation order or plan's effective date, no event occurred to terminate the automatic stay. In addition, neither the plan nor the confirmation order contained any provisions that continued the automatic stay with respect to any actions after the plan's effective date. Furthermore, we are not aware of any order that could be construed as continuing or reinstating the automatic stay on [REDACTED]'s right to petition the Tax Court after confirmation or the plan's effective date.

By [REDACTED] the Joint Committee on Taxation (JCT) issued its report under I.R.C. §6405(b) related to the taxable years set forth in the proposed Form 870-AD. Such report indicated that the JCT had no objection to the Service's report and Form 870-AD.

All relevant tax returns appear to have been filed timely. There is no evidence of any fraudulent conduct by [REDACTED].

Issue 1 - Legal Discussion

Generally, the Service has three years from the filing of a tax return to assess an income tax deficiency. I.R.C. §6501(a). However, two relevant exceptions apply to this case.

First, as discussed above for deficiencies attributable to NOL carrybacks from a later year, the applicable limitation period is governed by the limitation period that applies to the later year in which the NOL carryback was generated. I.R.C. §6501(h) and §6501(k). Second, before the expiration of the applicable limitation period under I.R.C. §6501(a), §6501(h), and §6501(k), the Service and the taxpayer may execute an agreement to extend that time. I.R.C. §6501(c)(4).

After the mailing of a notice of deficiency within the

period set forth in I.R.C. §6501, the running of that limitation period is suspended for the period during which the automatic stay restricts the taxpayer's right to petition the Tax Court plus an additional 210 days. I.R.C. §6213(a) (90 days after issuance of SND), §6213(f) (60 days after prohibition on filing a Tax Court petition terminates), and §6503(a) (1) (60 days after prohibition under I.R.C. §6213 terminates); Galanis v. Commissioner, 92 T.C. 34, 37-39 (1989).

Generally, a taxpayer must file a petition with the Tax Court contesting the deficiencies asserted in a timely notice of deficiency (SND) issued to the taxpayer within 90 days of the issuance of that SND. I.R.C. §6213(a). During the time given to a taxpayer to petition the Tax Court, the Service is prohibited from assessing any deficiency asserted in the SND. I.R.C. §6213(a).

Upon the filing of a Chapter 11 petition, a taxpayer is prohibited from filing a Tax Court petition to contest proposed income tax deficiencies. See 11 U.S.C. §362(a) (8) (automatic stay); Moody v. Commissioner, 95 T.C. 655, 658-59 (1990); Zamarello v. Commissioner, T.C. Memo 1991-494. When there is no pre-confirmation order terminating the automatic stay, this restriction does not terminate until the time of the granting of a discharge to a Chapter 11 debtor. See 11 U.S.C. §362(c) (2) (C); Moody, 95 T.C. at 658.

In the case of a Title 11 debtor, the Service's time for assessing tax is suspended during the pendency of the automatic stay plus 60 days thereafter. I.R.C. §6213(f) (1); Zimmerman v. Commissioner, 105 T.C. 220, 224 (1995).

Unless the Chapter plan 11 or confirmation order provide otherwise, confirmation of a plan discharges a debtor who continues to operate after confirmation and does not liquidate. 11 U.S.C. §1141(d) (1) and §1141(d) (3). Consequently, the entry of an order confirming a Chapter 11 plan generally terminates the automatic stay. In re Eagle Bus. Mfg. Inc., 158 B.R. 421, 429 (S.D. Tex. 1993); Moody, 95 T.C. at 658-62; Zamarello, T.C. Memo 1991-494 (when confirmed plan stated that discharge occurred on entry of confirmation order, date of entry of confirmation order, and not plan's effective date, governed date of discharge and termination of automatic stay).

However, when the plan or confirmation order postpones the effective date of confirmation and discharge after confirmation, the restrictions on the right to petition the Tax Court expire on the later date. In re Reisher, 149 B.R. 372, 373 - 374 (Bankr. M.D. Pa. 1992) (stay continued under confirmation order until completion of plan); In re Cumberland Farms, Inc., 162 B.R. 62, 70 (Bankr. D. Mass. 1993) (plan and order of confirmation stated that the discharge occurs on the effective date).

For a Chapter 11 debtor that has received its discharge, the remaining number of days in the applicable limitation period for assessment for deficiencies against that debtor after the granting of the discharge generally consist of the sum of the following:

1. The remaining days on the applicable assessment limitation period at the time of the issuance of the notice of deficiency under I.R.C. §6501(a) and §6501(c)(4) plus any additional days provided in a subsequently executed agreement under I.R.C. §6501(c)(4).

2. The 150-day period allowed for the debtor's filing of a Tax Court petition that commences after the granting of the discharge under I.R.C. §6213(a) and §6213(f).

3. 60 days under I.R.C. §6503(a)(1).

See Clark v. Commissioner, 90 T.C. 68, 71 (1988); Olsen v. Commissioner, 86 T.C. 1314 (1986); Thompson v. Commissioner, 84 T.C. 645, 648 (1985); McClamma v. Commissioner, 76 T.C. 754, 758 (1981).

However, the taxpayer may waive the restrictions on ~~assessment of a deficiency in income tax set forth in I.R.C.~~ §6213(a) for filing a Tax Court petition by a written agreement to assessment filed with the Service. I.R.C. §6213(d).

Issue 1 - Application of Law to Facts

The Service was prohibited from assessing the agreed income tax deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] until [REDACTED] for three reasons. First, under the terms of [REDACTED]'s confirmed plan and confirmation order granting a discharge on the plan's

effective date, the automatic stay prohibited [REDACTED]'s commencement of a Tax Court case with respect to such deficiencies until the effective date of the confirmed plan on [REDACTED] 11 U.S.C. §362(a)(8) and §1141(d)(1); In re Cumberland Farms, Inc., 162 B.R. at 70. The confirmation order specifically provided that if the effective date did not occur, then the plan was "null and void."

Second, the Service could not make any assessment until the earlier of the expiration of the period for the filing of a Tax Court petition by [REDACTED] or the execution of an effective waiver of that period by [REDACTED]. I.R.C. §6213(a), §6213(d), and §6213(f)(1). Such period could not commence until the date of discharge on [REDACTED]. Third, [REDACTED]'s Form 870-AD expressly conditioned [REDACTED]'s waiver of assessment prohibitions under I.R.C. §6213(d) to the issuance of a report of the JCT which did not object to the agreement and such report did not occur until [REDACTED]. Consequently, upon issuance of the JCT's report on [REDACTED], the Service may assess the agreed deficiencies set forth in the Form 870-AD in accordance with the provisions of I.R.C. §6213(d).

The limitation period for the Service's right to assess the deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] to the extent attributable to the NOL carrybacks from the taxable year ended December 31, [REDACTED] will not expire before [REDACTED]. This date is based on the addition of [REDACTED] days to [REDACTED]. These days are computed as follows:

Number of days remaining on limitation period
under I.R.C. §6501(h) & §6501(k) when Service
issued SND ([REDACTED] - [REDACTED]) [REDACTED]

25-day period during which Service prohibited
from making assessment after [REDACTED]'s discharge
[REDACTED] - [REDACTED] (effective date of
Form 870-AD waiver)) [REDACTED]

60 days under I.R.C. §6503(a)(1) 60

60 days under I.R.C. §6213(f) 60

Total [REDACTED]

With respect to the portion of the deficiency for the

taxable year ended December 31, [REDACTED] attributable to the NOL carryback from [REDACTED] the Service has until [REDACTED] to assess such deficiency. This date is based on the addition of [REDACTED] days to [REDACTED]. These days are computed as follows:

- Number of days remaining on limitation period under I.R.C. §6501(h) & §6501(k) when Service issued SND ([REDACTED] - [REDACTED]) [REDACTED]

25-day period during which Service prohibited from making assessment after [REDACTED]'s discharge [REDACTED] - [REDACTED] (effective date of Form 870-AD waiver)) [REDACTED]

60 days under I.R.C. §6503(a)(1) 60

60 days under I.R.C. 6213(f) 60

Total [REDACTED]

Please note that we have reduced the period for assessment of the portion of the deficiency for the taxable year ended December 31, [REDACTED] attributable to the NOL carryback discussed in our previous memorandum dated [REDACTED] from [REDACTED] from [REDACTED] days after [REDACTED] to [REDACTED] days after [REDACTED]. This reduction is based on our National Office's recommendation that the Service take a cautious approach in calculating the limitation period for the deficiency related to such NOL carryback.

Our National Office's recommendation is supported by three factors. First, the Form 872 for the year ended December 31, [REDACTED] was unnecessary because the Chapter 11 proceeding extended the assessment period beyond the specific date set forth in the Form 872. Second, because the Service did not issue a notice of deficiency for the year ended [REDACTED], the Form 872 only extended the assessment date to a specific date ([REDACTED]). Third, our National Office found no reported decisions that clearly support the longer limitation period.

Issue 2 - Legal Discussion

The provisions of a confirmed plan bind the debtor and its creditors. 11 U.S.C. §1141(d). Except as provided in the

plan and order of confirmation, confirmation of a plan discharges a debtor who continues to operate its business after confirmation from any debt that arose before confirmation regardless of whether a claim is filed or allowed. 11 U.S.C. §1141(d)(1)(A) and §1141(d)(3).

With respect to allowed prepetition priority tax claims, a Chapter 11 plan must provide deferred cash payments, over a period not exceeding six years after the date of assessment of the claims, of a value, as of the effective date of the plan, equal to the allowed amount of the claims. 11 U.S.C. §1129(a)(9)(C). Prepetition priority tax claims include tax liabilities that are not assessed, but assessable, after the commencement of a Chapter 11 case and do not relate to delinquent returns filed within two years of the commencement of the Chapter 11 case or fraudulent conduct. 11 U.S.C. §507(a)(8), §523(a)(1)(B), and §523(a)(1)(C).

Issue 2 - Application of Facts to Law

The confirmed plan, which is binding on both [REDACTED] and the Service, provides for payment of the Service's allowed prepetition priority tax claims. Because the agreed deficiencies were not assessed, did not relate to delinquent returns, or fraudulent conduct, but were assessable after the commencement of [REDACTED]'s Chapter 11 case, they will be allowed prepetition priority tax claims under 11 U.S.C. §507(a)(8) when they satisfy all four conditions for allowed claims.

The confirmed plan and confirmation order expressly limited the scope of [REDACTED]'s discharge by the phrase "[e]xcept as otherwise expressly provided in the Plan or as otherwise agreed to in writing by [REDACTED] since the Petition Date". See Section [REDACTED] on pages [REDACTED] of plan; paragraphs [REDACTED] and [REDACTED] on pages [REDACTED] of the confirmation order. The Form 870-AD, which [REDACTED] executed in accordance with the Bankruptcy Court's order entered [REDACTED], is a written agreement by [REDACTED] since the commencement of the Chapter 11 case that is binding on the parties after confirmation. With JCT approval, such agreement permits the Service to assess the agreed deficiencies. Consequently, [REDACTED]'s Chapter 11 discharge does not prohibit assessment of the agreed deficiencies and the Service may assess the agreed deficiencies.

Conclusion and Recommended Action

All restrictions on the Service's authority to assess the agreed income tax deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] expired by [REDACTED]. In addition, [REDACTED]'s Chapter 11 discharge does not prohibit assessment of the agreed deficiencies.

With respect to the portion attributable of the deficiencies to the NOL carrybacks from the year ended December 31, [REDACTED], the period for assessment will not expire before [REDACTED]. With respect to the portion of the deficiency for the taxable year ended December 31, [REDACTED] attributable to the NOL carryback from the year ended [REDACTED], the period for assessment will not expire before [REDACTED].

Therefore, we recommend that Service assess the agreed income tax deficiencies for the taxable years ended December 31, [REDACTED] and December 31, [REDACTED] as soon as possible. Once the time to object to claims in [REDACTED]'s Chapter 11 case expires and the assessed deficiencies satisfy all conditions for allowed prepetition priority tax claims, the terms of [REDACTED]'s confirmed Chapter 11 plan will govern payment of the deficiencies and applicable interest.

If you have any questions, please contact me at 404/338-7943.



CAROLYN LEE ROUNTREE
Special Litigation Assistant
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Attachments:

As stated above

✓ cc: TL Cats

cc: Ms. Hanna Klapper (by e-mail)
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